80-1850

No. ——

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE: JAMES DWIGHT VICKERS
a/k/a J. D. VICKERS
a/k/a JIM VICKERS
a/k/a JIMMY VICKERS

COLONIAL BANK OF NEW ORLEANS, *Petitioner*

v.

JAMES DWIGHT VICKERS, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

QUESTIONS PRESENTED FOR REVIEW

1. Where objection to discharge of Bankrupt is premised upon allegations, pursuant to 11 *U.S.C.A.* 32(c)(3) and (7), that the Bankrupt obtained money on credit by the making of a false written statement respecting his financial condition, and that the Bankrupt has failed to satisfactorily explain any losses of assets or deficiencies of assets to meet his liabilities, must the granting of discharge by the Bankruptcy Court be affirmed on appeal unless its findings as to the ultimate issue or mixed questions of law and fact are "clearly erroneous"; or is such decision subject to review free of the "clearly erroneous" rule?

2. Where the Bankrupt admits the making of a personal financial statement in writing reflecting net assets of approximately 1.1 million dollars and admits that an accurate statement would reflect zero net assets, did the Bankruptcy Court err in granting discharge over creditor's objection?

3. Where Bankrupt admits the making of a personal financial statement in writing reflecting net assets of 1.1 million dollars, and less than two years later files a voluntary petition for bankruptcy listing assets of $1,325.00 and liabilities of over $4,000,000.00, and does not explain this loss of assets or deficiency of assets to meet his liabilities, was discharge properly granted over objections of creditor bank?

PARTIES

The parties to this proceeding are:

Colonial Bank of New Orleans, New Orleans, Louisiana	*Petitioner*
James Dwight Vickers	*Respondent*

Petitioner, Colonial Bank of New Orleans, is a Louisiana banking corporation and has no parent companies or subsidiaries.

The only affiliate of Petitioner is Colonial Leasing Corporation, a Louisiana Business Corporation.

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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

IN RE: JAMES DWIGHT VICKERS
a/k/a J. D. VICKERS
a/k/a JIM VICKERS
a/k/a JIMMY VICKERS

COLONIAL BANK OF NEW ORLEANS, *Petitioner*

v.

JAMES DWIGHT VICKERS, *Respondent.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

REPORTS OF OPINIONS DELIVERED BELOW

Neither the opinion of the United States Court of Appeals for the Fifth Circuit nor the Order Denying Petition for Rehearing is reported officially or unofficially.

The United States District Court for the Northern District of Mississippi did not issue an opinion.

The opinion of the Bankruptcy Judge, United States District Court for the Northern District of Mississippi was not reported, officially or unofficially.

JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit, by decision dated November 24, 1981, affirmed the decision of the United States District Court for the Northern District of Mississippi which affirmed the order of the Bankruptcy Judge, United States District Court for the Northern District of Mississippi, Greenville Division in this case.

Petition for Rehearing was timely filed, and by order dated and filed on February 19,1981, the United States Court of Appeals for the Fifth Circuit denied this petition.

The jurisdiction of this Court to grant this writ is based upon 28 *U.S.C.* 2101 (c).

STATUTES AND RULES

11 U.S.C.A., sec. 32(c)(1), (3) & (7)

"The court shall grant the discharge unless satisfied that the bankrupt has (1) committed an offense punishable by imprisonment as provided under section 152 of Title 18; or . . . (3) obtained money of property on credit, or obtained an extension or renewal of credit, by making or publishing or causing to be made or published in any manner whatsoever, a materially false statement in writing respecting his financial condition; or . . . (7) has failed to explain satisfactorily any losses of assets or deficiency of assets to meet his liabilities: Provided, That if, upon the hearing of an

objection to a discharge, the objecter shall show to the satisfaction of the court that there are reasonable grounds for believing that the bankrupt has committed any of the acts which, under this subdivision, would prevent his discharge in bankruptcy, then the burden of proving that he has not committed any of such acts shall be upon the bankrupt."

Bankruptcy Rule 752

"(a) Effect. In all matters tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon, and the judgment shall be entered pursuant to Rule 921(a). Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under these rules except when, on a motion to dismiss under Rule 741, the court renders a judgment on the merits after a trial on the facts.

STATEMENT OF THE CASE

In the summer of 1977, the respondent, James Dwight Vickers, as a managing officer of Toche Enterprises, Inc. and individually, for the purpose of obtaining a loan for shipbuilding purposes in excess of $1,300,000 from petitioner, Colonial Bank of New Orleans, submitted to the Bank his personal financial statement revealing a net personal worth of at least 1.1 million dollars. Petitioner contends that such financial

statements were submitted in the form of documents dated April 30, 1977, and October 31, 1977. Respondent, Vickers, contends that neither of these documents is an authentic financial statement. Respondent admits however, that he did submit to petitioner, a financial statement reflecting such net worth in the summer of 1977.

Petitioner contends and respondent admits that such financial statement listed as a personal asset, an Arkansas plantation home valued, according to the statement, at $900,000; an interest in Mainstream Shipyards (a separate enterprise) and personal property and jewelry with a listed value in excess of $100,000.00.

In actuality at the time of the submission of such financial statement the Arkansas real estate had already been conveyed solely to Respondent's wife; and the interest in Toche Enterprises, Inc. (an expired option to purchase) was valueless.

In November, 1978, Vickers filed his voluntary petition for bankruptcy in the United States District Court for the Northern District of Mississippi, Greenville Division, listing assets of $1,325.00 including only $200 for personal jewelry and liabilities of $4,130,989.71, including the debt to petitioner ($300,000.00 listed by Respondent although Petitioner asserts such debt exceeds $1,000,000.00).

Petitioner, Colonial Bank of New Orleans filed a complaint objecting to respondent's discharge alleging several grounds including failure to explain satisfactorally loss of assets and deficiencies of assets to meet his liabilities and, that Vickers, as managing officer of Toche Enterprises, Inc. and individually for the purpose of obtaining money or property on credit

or obtaining an extension or nenewal of credit made and published, and/or caused to be made and published a materially false statement in writing respecting his financial condition.

Trial on the complaint of Colonial Bank of New Orleans was held on May 10th through 11th, 1979. By memorandum opinion dated May 30, 1979, the Bankruptcy Court determined that the complaint of Colonial Bank of New Orleans should be dismissed. (See Appendix) This decision was affirmed by The United States District Court for the Northern District of Mississippi on February 13, 1980 (see Appendix) and by the United States District Court of Appeals for the Fifth Circuit on (See Appendix) On February 19, 1981, the Court of Appeals denied Petitioner's petition for rehearing. (See Appendix)

Federal jurisdiction in the Court of first instance is premised upon the provisions of the Bankruptcy Act providing for the filing of such complaints by creditors against the bankrupt in order to determine the dischargeability of debts and vesting in the Bankruptcy Court jurisdiction to hear such complaints. 11 *U.S.C.A.* 32(b), (c) (Sec. 14(b), (c) of the Bankruptcy Act of 1898.)

ARGUMENT

The United States Court of Appeals for the Fifth Circuit in its decision in this case has so widely departed from the usual course of judicial proceedings and has sanctioned such a wide departure from the applicable rules of law by the lower courts, so as to call for an exercise of this Court's power of supervision by reviewing the decisions below.

Petitioner's complaint below was premised upon the allegations that Respondent, bankrupt, as a managing officer of Toche Enterprises, Inc. and individually for the purpose of obtaining money or property on credit or obtaining an extension or renewal of credit made and published or caused to be made and published a materially false statement in writing respecting his financial condition and that further the respondent had failed to attempt in any manner to explain satisfactorally the loss of the assets or deficiency in assets during the years preceding his bankruptcy. These objections were premised upon Section 14(c)(3) and (7) of the *Bankruptcy Act of 1898,* 11 *U.S.C.A.* 32(c)(3) and (7).

In this regard the Respondent contended that documents dated April 30, 1977, and October 31, 1977, were not authentic financial statements prepared by the Respondent and submitted to the Petitioner bank.

It became evident below however, that the authenticity of such documents was not essential in order for Petitioner's objections to prevail for the respondent consistently admitted in deposition and in testimony at the trial before the Bankruptcy Judge, that he had in fact during the time period in question submitted at the request of the bank his personal financial statement upon which the Petitioner bank relied in advancing monies for the respondent's benefit.

Among the assets which the Respondent admittedly listed on his financial statement was a home in Chicot County, Arkansas for which he asserted a value of $900,000. Additionally, Respondent admitted that the financial statement included as an asset stock acquisition costs in Mainstream Shipyards.

It was revealed at the trial of this matter that months before such financial statement was presented the home in Arkansas had in fact been conveyed by Respondent to his wife and became her sole property. Further, it was revealed that the only interest of the Respondent in Mainstream Shipyards was an option which he purchased for $200,000 which had expired prior to the submission by respondent of his financial statement.

The decisions below depart from accepted legal principles and further conflict with decisions of other federal courts of appeal involving similar fact situations.

First, the decisions below premise the affirmance of the Bankruptcy Judge's decision to a great extent on finding that the Bankruptcy Court's determination were not "clearly erroneous." (Appendix, Order of U. S. District Court for the Northern District of Mississippi, Greenville Division; and Opinion of U. S. Court of Appeals for the Fifth Circuit, November 24, 1980.)

It is submitted however, that the "clearly erroneous" rule is applicable only to findings of fact made by the Bankruptcy Court. *Bankruptcy Rule* 752.

In this case far more than findings of fact were made by the Bankruptcy Judge. By determining that the respondent had not made and published or caused to be made and published a materially false statement in writing respecting his financial condition the Bankruptcy Court applied law to the facts as he found them and determined the ultimate issue in question. As stated in *Matter of Hammons,* 614 F. 2d 399 (5th Cir. 1980) at page 403:

> "The Bankruptcy Judge's 'new and different business' determination was a conclusion as to the

> legal significance of evidentiary facts. As such, it was subject to review free of the clearly erroneous rule."

The cited case further proffers the proposition that the Appellate Court must independently determine the correctness of the ultimate legal conclusion adopted by the Bankruptcy Judge on the basis of the fact found.

Directly in point is *In re Pioch,* 235 F.2d 903 (3rd Cir. 1956). There it is stated at page 905:

> "Before proceeding further, it must be pointed out that the District Court erred in its view that "The Referee's conclusion that the bankrupt intended to hinder, delay, and defraud his creditors must be affirmed by this court unless it is clearly erroneous.'
>
> "With respect to the Referee's 'conclusion', it must immediately be noted that it was in the nature of an ultimate finding of fact and on that score, it is well settled that such a finding is but a legal inference from other facts and as such is subject to review free of the restraining impact of the so-called 'clearly erroneous rule' applicable to ordinary findings of fact by the trial court."

This clearly established principle was not followed by the United States Court of Appeals for the Fifth Circuit in this case.

Accordingly, the Appellate Court departed from the applicable rule and applied the clearly erroneous standard to the case at hand.

Additionally, the Court departed from the usual course of proceedings such as this in disregarding the authority of *Berley* v. *Fiol,* 124 F. 2d 676 (2d Cir.

1942) in which the bankrupt on a financial statement had listed his home as an asset. At a hearing on objection to his discharge the bankrupt testified that the title to the property had been in fact in his wife's name. It was held:

> "There is not the slightest doubt that the statements above referred to were false in that they represented that the bankrupt owned his own house and failed to disclose the large judgment against him . . ."

From the Seventh Circuit is *Pascal* v. *Pallos State Bank,* 401 F. 2d 63 (7th Cir. 1968) in which it is stated at page 65:

> "The testimony of the bankrupt before the referee was that the house listed as an asset was in fact in trust for his wife. The record before this Court is void of any evidence presented by the bankrupt to controvert this fact. Therefore, under the proviso of Section 14(c)(3), the burden of proof clearly had shifted to the bankrupt and the referee was completely justified in his finding that 'the financial statement of May 6, 1964, was a false statement."

It is accepted that when a materially false financial statement is shown by the objecting party the burden shifts to the respondent to disprove the presumed intent to deceive. 11 *U.S.C.A.* 32(c); *In re Haggerty,* 165 F.2d 977 (2nd Cir. 1948).

The Court of Appeals, the District Court, and the Bankruptcy Judge in this case disregarded the above cited rules of law. It is submitted that if this case is reviewed it will be found that the evidence points inescapably to the conclusion that a false financial statement was submitted by the bankrupt Respondent

in that by his own admission a financial statement was submitted which contained a listing of some assets which in fact the respondent did not possess.

The granting of this petition for writ of certiorari is also appropriate in that a departure was made by the Courts below from accepted and recognized law preventing a discharge in bankruptcy where the bankrupt has failed to satisfactorily explain the loss of assets leading to bankruptcy.

At trial Respondent admitted that in 1977 he submitted a financial statement to Petitioner which revealed a net worth of approximately 1.1 million dollars.

In November, 1978, Respondent filed his voluntary petition for bankruptcy listing assets of $1,325.00 including only $200 for personal jewelry and liabilities of $4,130,989.71 including an indebtedness to Petitioner, Colonial Bank of New Orleans, in the sum of at least $300,000.00.

Upon review it will be found that Respondent has in no way or manner sought to explain this fantastic diminution in assets in a period of a few months. In this regard *Gardner* v. *American Century Mortg. Inv.*, 577 F. 2d 928 (5th Cir. 1978) states that when a prime facie case for denying a discharge is made by a creditor the burden of proving that the debtor has not committed acts justifying the denial of discharge shifts to the bankrupt. Further, once the objecting creditor meets the initial burden of producing evidence to prove the facts to establish the objection the burden passes to the bankrupt to go forward with evidence that will "explain satisfactorily" the losses or deficiencies.

The cited case further establishes that more is required of the bankrupt in explanation than mere generalities.

Additionally, the Seventh Circuit in *Baum* v. *Earl Milliken, Inc.*, 359 F. 2d 811, 814 (7th Cir. 1966) determined that:

> "A 'satisfactory explanation' of a loss of assets to meet liabilities within the meaning of Section 14(c)(7) of the Bankruptcy Act must consist of more than the vague, indefinite and uncorroborated hodgepodge of financial transactions presented by the bankrupt in thise case . . ."

CONCLUSION

It is submitted that in view of the departures from established law and practice by the Court below, the conflict of decisions of other Circuits, and the enormity of the indebtedness to Petitioner which Respondent seeks to discharge, that a granting of Petitioner's petition for writ of certiorari is appropriate.

Respectfully submitted,

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APPENDIX

APPENDIX

1. Opinions from court below

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT A

No. 80-3191
Summary Calendar

In the Matter of:
JAMES DWIGHT VICKERS, a/k/a J. D. Vickers,
a/k/a Jim Vickers, a/k/a Jimmy Vickers, Bankrupt.
COLONIAL BANK OF NEW ORLEANS, *Plaintiff-Appellant,*

versus

JAMES DWIGHT VICKERS, *Defendant-Appellee.*

Appeal from the United States District Court for the Northern District of Mississippi

(November 24, 1980)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

This is an appeal from an order of the bankruptcy judge, affirmed by the district court, which dismissed on the merits the complaint filed by Colonial Bank of New Orleans objecting to the discharge of James Dwight Vickers on his petition for bankruptcy.

The principal ground asserted by the bank for denial of the discharge is based on § 14(c)(3) of the Bankruptcy Act of 1898, which provides that the bankruptcy court shall grant the discharge unless it is satisfied that the bankrupt has obtained money on credit by the making of a false

written statement respecting his financial condition. The bank contends that Vickers submitted a false financial statement to it in connection with a loan it made to keep his corporation in business.

The bankruptcy judge found that the signature on the financial statement introduced into evidence by the bank, which it contends was false, was a forgery of Vickers' signature. Although recognizing that it was not necessary for the bank to have a signed financial statement from the bankrupt in order to come within § 14(c)(3), the bankruptcy judge concluded that the forgery on the document offered by the bank as being the bankrupt's financial statement lent credence to Vickers' testimony that the document was not the financial statement he furnished to the bank. The judge found that the document was, therefore, not the financial statement that Vickers furnished to the bank. "Since no other financial statement of James D. Vickers . . . was offered in evidence," the bankruptcy judge held there was no evidence that "Vickers obtained money or property on credit for his corporation by means of a false statement in writing concerning his financial condition."

The bank on appeal argues that although no other financial statement of Vickers was offered into evidence, there was evidence of a false financial statement adduced during trial; specifically, the bank argues that Vickers' own testimony clearly established that he furnished the bank with a false financial statement—albeit not the one offered by it. We cannot agree.

After thoroughly reviewing the record herein, we are unable to find anything in the bankrupt's testimony tending to prove that he gave the bank a *false* financial statement. Therefore, we are unable to hold that the findings of the bankruptcy court—specifically, that there was no evidence of Vickers making a false statement in writing about his financial condition—are clearly erroneous. *See* In the Matter of Bardwell, 610 F.2d 228, 230 (5th Cir. 1980).

The bank also argues that the bankruptcy judge erred by (1) denying its motion after trial to amend its complaint to allege the making of a false oath in the bankruptcy proceedings as an additional ground for denial of discharge; (2) refusing to reopen the records to allow the testimony of two witnesses to the effect that the financial statement offered by the bank was indeed furnished by the bankrupt; and (3) refusing to amend its findings of fact and conclusions of law or to grant a new trial. We hold these arguments to be wholly without merit.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

UNIT A

No. 80-3191
Summary Calendar

In the Matter of:
JAMES DWIGHT VICKERS, a/k/a J. D. Vickers, a/k/a Jim Vickers, a/k/a Jimmy Vickers, Bankrupt.
COLONIAL BANK OF NEW ORLEANS, *Plaintiff-Appellant*,

versus

JAMES DWIGHT VICKERS, *Defendant-Appellee*.

Appeal from the United States District Court for the Northern District of Mississippi

ON PETITION FOR REHEARING

(Filed February 19, 1981)

Before CHARLES CLARK, REAVLEY and WILLIAMS, Circuit Judges.

PER CURIAM:

Appellant, in its petition for rehearing, brings to our attention that in our prior opinion we overlooked its objection to the bankrupt's discharge on the ground that he failed to satisfactorily explain the loss of his assets.

In his memorandum opinion, the bankruptcy judge wrote:

> "The remaining objections were based principally upon the items and the values shown on the financial statement (plaintiff's Exhibit 1). Since that document has been discredited, the need to explain the values which appear on it has disappeared. With respect to the bankrupt's interest in Delta Towing Company, Mr. Vickers testified that the value placed on that company on the statement which he says he gave to plaintiff was very much lower than the figure shown on plaintiff's Exhibit 1. In any event, the testimony

of the bankrupt and his other witnesses fully explained what happened to the assets of Delta Towing Company.

"With respect to the other objections, Mr. Vickers was examined at length with respect to all of the various assets shown on plaintiff's Exhibit 1 and I find that he has explained what happened to each of those assets and I find that there has been no failure to explain losses or deficiency of assets and that there has been no proof that the defendant transferred, removed or concealed assets with intent to hinder, delay or defraud his creditors. Likewise I find that the objections that he failed to list in his schedules assets shown on the financial statement have not been sustained.

"One item on plaintiff's Exhibit 1 that deserves some comment is the home on Macon Lake Plantation, which, according to plaintiff's Exhibit 1, was said to have an appraised value of $900,000.00. Actually, prior to the making of the loan, the bank had an appraisal made by a real estate firm of its choosing. That appraisal showed a value for the home of $300,000.00 and the bank took a promissory note and mortgage on that home for $300,000.00, signed by both the bankrupt and by his wife, Susan Smith Vickers.

"It would serve no useful purpose for the court to detail the evidence with regard to each of the items of property which the defendant admitted that he had owned. Suffice it to say that the court finds that he has fully explained what happened to each of such items."

We, like the district court, have carefully reviewed the record of this case and conclude that these findings of the bankruptcy court are not clearly erroneous.

It Is Ordered that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.

ii. Other opinions, judgments and orders

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GC 79-187-S
GBK 78-00147

COLONIAL BANK OF NEW ORLEANS, *Plaintiff*

v.

JAMES DWIGHT VICKERS, *Defendant*

ORDER

This action is before the court upon the plaintiff's appeal from the orders of the bankruptcy court dismissing the plaintiff's complaint objecting to discharge, denying plaintiff leave to file an amended or supplemental complaint, and denying plaintiff leave to re-open the proceedings to allow the introduction of certain testimony. Having carefully considered the record of this case, the transcript of proceedings, and the memoranda of the parties, the court is of the opinion that the decision and orders of the bankruptcy court must be affirmed. The findings of the bankruptcy court are based upon sufficient evidence, and this court cannot say that such findings were clearly erroneous. *See In re Bardwell*, No. 77-2863 (5th Cir. Jan. 15, 1980), —— F.2d ——. Accordingly, it is

ORDERED AND ADJUDGED:

(1) That the judgment of the bankruptcy court, entered on May 31, 1979, shall be and the same hereby is affirmed;

(2) That the bankruptcy court's order of May 30, 1979, denying plaintiff's motion for leave to file an amended and supplemental complaint, shall be and the same hereby is affirmed;

(3) That the bankruptcy court's order of May 30, 1979, denying plaintiff's motion for leave to reopen the trial of the case to permit the testimony of J. Herbert Boydston, shall be and the same hereby is affirmed; and

(4) That the bankruptcy court's order of September 12, 1979, denying plaintiff's motion for leave to amend its complaint, and denying plaintiff's motion to amend findings of fact, or for a new trial, shall be and the same hereby is affirmed.

This 13th day of February, 1980.

/s/ ORMA R. SMITH
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GBK78-00147

IN RE JAMES DWIGHT VICKERS,
a/k/a J. D. VICKERS,
a/k/a JIM VICKERS,
a/k/a JIMMY VICKERS, BANKRUPT

COLONIAL BANK OF NEW ORLEANS, *Plaintiff*

vs.

JAMES DWIGHT VICKERS, *Defendant*

MEMORANDUM ORDER

(Filed May 30, 1979)

Plaintiff, Colonial Bank of New Orleans (Colonial), seeks in this adversary proceeding to prevent the bankrupt from obtaining a discharge in bankruptcy. A number of grounds were asserted for the denial of a discharge, but the principal one and the one to which most of the testimony in a two-day trial was directed was the ground stated in clause (3) of § 14(c) of the Act which reads:

> "c. The court shall grant the discharge unless satisfied that the bankrupt has . . . (3) while engaged in business as a sole proprietor, partnership or as an executive of a corporation, *obtained for such business* money or property on credit or as an extension or renewal of credit by making or publishing or causing to be made or published in any manner whatsoever a materially false statement in writing respecting his financial condition or the financial condition of such partnership or corporation; . . ." (emphasis supplied).

James Dwight Vickers, the bankrupt, a man with considerable background in the towboat and boat building businesses, took over, early in 1976, the controlling stock interest in Toche Enterprises, Inc. (Toche), a corporation which was engaged in the shipbuilding business on the Mississippi Gulf Coast. Toche was in serious financial condition at the time and Vickers bought the stock of the company without paying any cash for it, but by assuming the indebtedness. Notwithstanding its financial condition at the time of purchase, Vickers considered the transaction an opportunity for him to turn the business around and make a profit. Toche was at the time indebted to First Mississippi National Bank of Biloxi (First Mississippi) and was still so indebted at the time when the petition in this case was filed.

Vickers invested a considerable amount of his own money in building up the Toche plant. In 1977 Toche had a contract to build a ship for a corporation named Tradewinds International, Inc. (Tradewinds). Tradewinds had a "take out letter" from Greyhound Leasing & Financial Corporation and its wholly owned subsidiary, Railway Equipment Leasing Corporation (RELC) which, in landlubber's terms, was a commitment by Greyhound and RELC for permanent financing of the vessel once it had been completed. The actual form of this financing was to be a purchase of the vessel by RELC from Toche upon its completion, followed by a leaseback by RELC to Tradewinds (plaintiff's Exhibit 13).

Notwithstanding that permanent financing for the vessel, then still known only as "Hull 103", had been arranged, Toche was in need of working capital to complete the construction of this vessel and First Mississippi, from which Toche had been getting its financing, had already loaned Toche about as much money as it desired to or could legally do. Consequently, Toche, represented by Vickers, and Tradewinds, represented by its officers, actively sought

further financing so that performance of the construction contract between Toche and Tradewinds could be completed. In the spring of 1977 they found what they were looking for at the Bossier Bank and Trust Company (Bossier) of Bossier City, Louisiana. Bossier, however, for reasons that were not explained at the trial, preferred not to make the loan itself, but sent Toche and Tradewinds to Colonial and recommended to Colonial that Colonial should make this loan. Colonial was represented throughout the transaction by its president, George M. Sneed, who was plaintiff's principal witness at the trial. Mr. Sneed was no longer with Colonial at the time of the trial, but, at the time of the transactions to which he testified, he was the president of Colonial.

There followed a series of conferences at Colonial attended by Sneed, Vickers and officials of Tradewinds and officials of Bossier, including, from time to time, Mr. Beebe who was chairman of the board of Bossier, Herbert Boydston, and a Mr. Anderson, both of whom were officers of Bossier.

Toche first wanted a loan of $1,500,000.00, but was cut down to $1,300,000.00, although later on additional money was advanced bringing the loan to an amount in excess of $1,400,000.00. During the negotiations, it was determined that the loan, at least in form, would be to Tradewinds, rather than to Toche and, when the loan was closed, Toche was the only party which signed the promissory note that constituted the principal obligation to Colonial. Bossier actively recommended this loan to Colonial and Bossier participated in the loan, according to Mr. Sneed, Colonial's president, to the extent of $700,000.00 of the first $800,000.00 advanced, and ultimately to the extent of $1,000,000.00 out of the $1,400,000.00 plus that eventually was loaned. However, notwithstanding that Tradewinds was the only signer of the notes, Colonial, as part of the loan transaction, required from Vickers, Toche and others a formidable

number of guarantees, financial statements, and other documents.

The loan agreement itself was signed on July 27, 1977 at the Colonial Bank. This agreement was signed not only by Colonial and by Tradewinds, but by Toche, by A. Z. Marine Transportation, Inc., by P & F Towing Company, Inc., by Venture Capital, Inc., and by J. D. Vickers, individually. The agreement was also signed by Philip E. Watkins, G. F. Smith, and by W. R. Smith, all of whom were officers of one or more of the various corporate signatories. The agreement required a $150,000.00 limited guaranty from W. R. Smith and from Venture Capital, a note by Tradewinds in the amount of $1,300,000.00 at a rate of interest fixed at 3½% above the Citibank, N.A. of New York prime rate and full guaranty agreements by all of the other signers, both corporate and individual. Toche executed such a guaranty and so did J. D. Vickers. As further security for Vickers' guaranty, the bank asked for and received a first mortgage on the Vickers' residence in Chicot County, Arkansas, signed by J. D. Vickers and by Susan Smith Vickers, his wife. In addition, a life insurance policy was taken out on the life of J. D. Vickers in the amount of $1,300,000.00 and was assigned to Colonial. The premium for this policy was to be paid for out of the proceeds of the loan. Financial statements were to be supplied to Colonial by all of the parties to the agreement and there was also a provision that as soon as the hull of the vessel being built by Toche for Tradewinds had been completed to a point which will cause it to be legally capable of identification for such purpose, Tradewinds and/or Toche would execute in favor of Colonial a First Preferred Ships Mortgage on said hull. There were several other provisions of the contract, for Colonial's protection, but which are not important to the solution of the issues before this court for decision.

Some time during the negotiations, or thereafter, a written statement of the financial condition of Mr. J. D.

Vickers individually was furnished to Colonial. The only such statement that has been offered in evidence is plaintiff's Exhibit 1 and since this exhibit and its contents are the basis for most of the controversy involved, a copy of this exhibit will be made an annex to this opinion.

There is a serious factual question as to whether the document offered in evidence as plaintiff's Exhibit 1 is genuine. The defendant strenuously denied that plaintiff's Exhibit 1 was the financial statement which he furnished to Colonial.

Before we reach that factual question, however, there is a question of law that must first be considered. The defendant contends that, even if we assume the genuineness of plaintiff's Exhibit 1, nevertheless this particular financial statement is not a statement which is included in § 14(c)(3) of the Bankruptcy Act. This clause of § 14(c) requires that the bankrupt "while engaged in business . . . as an executive of a corporation obtained for *such business* money or property on credit or as an extension or renewal of credit" by means of a materially false written financial statement. The bankrupt says that in order for the quoted language to apply to a statement of Vickers' financial condition, the statement must have been used to obtain money or property for Tochc, a corporation of which Vickers was an executive; whereas, says the defendant, Colonial made its loan to Tradewinds, of which corporation Vickers was not an executive, and therefore the money or property was not obtained "for such business". The parties have not found and cited to the court, and the court has not itself found any case which bears on this specific question of law.

The defendant's argument has a certain amount of surface attraction and there may be factual situations where the furnishing of a financial statement by an executive of a corporation that was merely a surety on the obligation of another corporation might not be within the confines of

§ 14(c)(3). However, a more detailed analysis of this loan transaction will disclose that, although the loan, in form, was to Tradewinds, it was really Toche which needed and which received the proceeds of the loan.

Under the loan agreement, each draw was to be preceded by a request for an advance, signed by both Toche and Tradewinds. The first draw of $800,000.00, was granted by the bank only after it had been supplied with a marine survey showing that Hull 103 already had $800,000.00 worth of labor and materials in it. Furthermore, the $800,000.00 was credited to Toche and was disbursed by a series of cashier's checks, each signed by Sneed, the president of Colonial, and each of these cashier's checks, most of which were made payable to creditors of Toche, was preceded by a check in a corresponding amount signed by Toche. Not only was this so, but some of the bills paid by Toche with these cashier's checks were for amounts owing for materials used by Toche in the construction of other hulls that Toche was then working on, and the money was not disbursed solely for debts arising out of the construction of the vessel which Toche was building for Tradewinds. It has also been pointed out by plaintiff that the proceeds of this loan were not needed by Tradewinds, which already had a commitment for permanent financing of the vessel, but were needed by Toche in order for it to be able to complete the vessel, and that while the loan was in form to Tradewinds, what Tradewinds wanted and needed was interim financing for Toche. I have concluded, that in view of the factual situation disclosed by the evidence, this was a transaction by which Vickers, helped, it is true, by the other signatories to the loan agreement, obtained money or property for Toche.

We turn now to plaintiff's Exhibit 1, which Colonial contends is the financial statement of James Dwight Vickers as of April 30, 1977, and which Colonial says was furnished to it by Vickers during the negotiations leading up to the

making of the loan agreement dated July 27, 1977, and on which it relied in entering into said loan agreement. It is also contended by Colonial that this statement was materially false in a number of respects.

Mr. Sneed, who was Colonial's president throughout the time of the loan transaction and who was also Colonial's principal witness, testified that this statement was the only statement of Vickers' financial condition which he had ever seen. He did not know just how this statement got to the bank. It was not handed to him personally by Vickers, he was unable to say who did first receive it on the part of the bank, and he was unable to state just at what stage of the transaction the statement was received. During his first appearance on the stand, the nearest he could come to fixing a date for the receipt of the statement by the bank was that he knew that he had had the statement in his possession and had discussed it with Vickers before the second advance under the loan was made in mid-August, 1977. Although excused as a witness well before the end of the first day of the trial, Sneed returned to the stand on the second day of the trial and testified that, overnight, he had examined the bank's file and found in it a copy of a letter which he had written to Boydston, an officer of Bossier, in which he told Boydston that he had received this financial statement, plaintiff's Exhibit 1, and was enclosing a copy of it with this letter to Boydston. Sneed testified that from reading the copy of this letter, his recollection was refreshed, and he could now testify that he had plaintiff's Exhibit 1 in his possession not later than June 17, 1977.

Plaintiff's Exhibit 1 consists of a single sheet of paper, letter size, which is headed

> "*James D. Vickers*
> *Financial Statement*
> *April 30, 1977*".

The statement shows Mr. Vickers with a net equity of $2,486,762.17.

At the bottom of the page, below all the figures, appears a handwritten signature, which purports to be the signature of J. D. Vickers. Mr. Sneed admitted that he did not see Vickers place this signature on the statement. No other witness produced by the plaintiff saw Mr. Vickers sign his name to this financial statement, nor did any witness for the plaintiff testify as to how this particular sheet of paper came into the possession of the bank. The testimony was, however, that this paper, plaintiff's Exhibit 1, did come from the file maintained by the Bank on the Tradewinds loan.

Vickers himself, when he later took the stand, denied that the signature was his. He also stated emphatically that plaintiff's Exhibit 1 was not the financial statement which he gave to the bank. On the contrary, he testified that the statement he gave consisted of several pages and included not only a statement of assets and liabilities, but also a series of notes to the statement, explaining a number of the entries on the statement. Vickers also said that it was accompanied by a letter from Mr. L. D. Robertson, a CPA, explaining the value appearing on the statement with respect to the bankrupt's interest in Delta Towing Company.

Mr. Vickers' father, J. E. Vickers, his accountant, Mr. W. E. Bradley, and a bookkeeper for companies operated by the senior Vickers, some of which were companies in which J. D. Vickers had an interest, were all placed on the stand and shown the signature at the foot of plaintiff's Exhibit 1. All three of them stated that they were well acquainted with the bankrupt's signature and that the signature appearing at the foot of plaintiff's Exhibit 1 was not the bankrupt's. Of course, none of these witnesses could be classified as completely unbiased. However, their testimony was not successfully challenged on cross exami-

nation, nor was it contradicted by the testimony of any other witness. No handwriting expert was called by either party. No witness testified that he saw the bankrupt sign his name to plaintiff's Exhibit 1 and no witness who was well acquainted with the signature of the bankrupt, testified that he recognized this signature as the signature of J. D. Vickers.

That leaves the court with the duty of determining, without the assistance of experts, whether the signature at the foot of plaintiff's Exhibit 1 was or was not placed there by the bankrupt. The court, of course, has only the average layman's ability to determine whether a particular "signature" is or is not the genuine article. Mindful of that, mindful also that people do not always sign their name exactly the same way, but taking into account also the fact that the plaintiff has the burden of proof throughout this proceeding (Bankruptcy Rule 407), the court has compared the signature on plaintiff's Exhibit 1 with the unquestioned signatures of J. D. Vickers on some ten other exhibits offered at this trial by the plaintiff. These are plaintiff's Exhibits 6, 7, 8, 9, 10, 11, 17, 18, 19 and 20.

After carefully comparing the signature on plaintiff's Exhibit 1 with the signatures on each of the foregoing exhibits introduced by plaintiff, and taking into account also the testimony given by Mrs. Hancock and Messrs. Bradley, J. E. Vickers and J. D. Vickers with regard to the signature at the foot of plaintiff's Exhibit 1, I have come to the conclusion that the purported signature at the foot of plaintiff's Exhibit 1 is not the signature of the bankrupt. The initials are written differently, particularly the initial "V". The "ick" of the name Vickers also seems considerably different from the appearance of the same letters on the other exhibits, and the final stroke at the end of the name is totally different. In all of the other exhibits, there is at the end a circle made by bringing the pen down, under and back, whereas on plaintiff's Exhibit 1, the final

stroke continues straight on to the right horizontally, without turning back to make the final circle.

Having found that the signature was not that of the bankrupt, the next task of the court is to consider what the significance is of there being a forged signature on the statement. I say "forged" because the words "J. D. Vickers" at the foot of plaintiff's Exhibit 1 is not ordinary handwriting, but is made to look as though it were a signature and, while it plainly is not the signature of J. D. Vickers, as exemplified by the genuine signatures on plaintiff's other exhibits, it is obvious that someone was making a clumsy attempt to make it look like the signature of J. D. Vickers.

Of course, it was not necessary for the bank to have a signed financial statement from the bankrupt in order to come within the confines of § 14(c)(3) of the Bankruptcy Act. All that was necessary was a statement in writing and this was, even without the signature, a statement in writing. When, however, Colonial came up with such a statement bearing a signature which was not the signature of the bankrupt, it becomes possible to infer that someone at Colonial, or perhaps someone at Bossier, not convinced that the statement they had from J. D. Vickers was good enough to satisfy the bank examiners, or perhaps even the bank's own loan committee, decided to supply the bank with a handsomer appearing statement, and went on to make the substitute statement appear more genuine (to gild the lily, if mixed metaphors are acceptable) by supplying what would to someone not familiar with Mr. Vickers' signature, appear to have been signed by him. The very least that can be said for the presence of a forged signature on the paper offered by plaintiff as being the financial statement of J. D. Vickers is that it lends credence to the positive testimony of Mr. Vickers that plaintiff's Exhibit 1 was not the financial statement which he had furnished to the bank.

I find that plaintiff's Exhibit 1 was not the financial statement on which the bankrupt furnished to Colonial. Since no other financial statement of James D. Vickers individually was offered in evidence, there is no evidence in this case that James D. Vickers obtained money or property on credit for his corporation by means of a false statement in writing concerning his financial condition.

Some time during the second day of the trial, which was a Friday, the plaintiff requested that the court continue the case into the following week so that plaintiff would have an opportunity to bring to the trial Mr. Herbert Boydston. Mr. Boydston had been an officer of Bossier at the time of the loan transaction and plaintiff wanted to offer his testimony with regard to the financial statement (plaintiff's Exhibit 1) which we have just been discussing. It was stated that Mr. Boydston was no longer with Bossier but was an officer of a bank in West Monroe, Louisiana, some ninety miles from Greenville, where the trial was being held. Mr. Boydston had not been present at the trial on either day and it was stated that he had not been able to come that day, but could be available the following week. This request by the plaintiff was overruled by the court, and I believe properly so. The bankrupt's testimony that plaintiff's Exhibit 1 was not the statement which he had furnished to the bank and that the signature appearing on that exhibit was not his signature, did not come as a surprise to plaintiff or its counsel. Mr. Vickers had given identical testimony during the course of a deposition which the plaintiff took on April 16, 1979, more than three weeks before the trial of this adversary proceeding. Parts of that deposition were offered in evidence at the trial by plaintiff (plaintiff's Exhibit 24) and the balance of the deposition was then offered in evidence by the defendant (defendant's Exhibit A). On pages 12 and 13 of the transcript of that deposition, the following appears:

> "Q. But certainly one of the documents that you prepared and signed was your current financial statement; correct?

A. Let me see. No. I don't know where he got this. This is not mine.

Q. That's not your financial statement?
A. That's not my signature either.

Q. That's not your signature at the bottom of it?
A. No, sir. That's not the one I gave him. That's not my signature and that's not the one I gave him. The one I gave him was three or four pieces of paper stapled together with an opinion from L. D. Robertson on the Delta Towing Company value, and footnotes all through the back as to what each individual item was and all is the one I gave Snead. I don't know where this came from.

Q. Is this a part of that package?
A. No, sir.

Q. You're sure of that?
A. Yes sir. 'Cause the one I signed I signed. And that's damned sure not my signature. That's not the financial statement I gave."

Plaintiff's counsel had the financial statement that was being discussed in the above quoted passage of the transcript marked as Exhibit A to Mr. Vickers' deposition. It is identical with the financial statement that was marked as plaintiff's Exhibit 1 in the trial of this adversary proceeding.

It is transparently clear that plaintiff's counsel knew more than three weeks before the trial that Mr. Vickers had declared under oath that the financial statement (plaintiff's Exhibit 1) was not the financial statement which he had delivered to the bank and had also denied under oath that the signature at the foot of the statement was his. Mr. Boydston apparently was within reach of the subpoena power of this court (Bankruptcy Rule 45). If counsel believed that his testimony would be helpful, he should have been subpoenaed to appear at the trial, or his deposi-

tion should have been taken. Not having had a subpoena issued for Mr. Boydston, having made no attempt to take his deposition, and not having made a motion prior to or at the commencement of the trial for a continuance for the purpose of securing Mr. Boydston's testimony, the court was fully justified, in the exercise of its discretion, in refusing to allow further time for the production of this witness.

Although the principal objection relied on by the plaintiff was the false financial statement (plaintiff's Exhibit 1), a number of other grounds of objection to the bankrupt's discharge were alleged in the original complaint. These were, failure to keep books and records; failure to explain losses and/or deficiency of assets; the transferral, removal or concealment of assets with intent to hinder, delay and defraud creditors; the failure to explain what happened to the net value of bankrupt's interest in Delta Towing Company; and a failure to list on the bankrupt's schedules assets shown on the financial statement.

The bankrupt testified fully with regard to what happened to his books and records. I find that there is no proof that the bankrupt failed to keep books and records.

The remaining objections were based principally upon the items and the values shown on the financial statement (plaintiff's Exhibit 1). Since that document has been discredited, the need to explain the values which appear on it has disappeared. With respect to the bankrupt's interest in Delta Towing Company, Mr. Vickers testified that the value placed on that company on the statement which he says he gave to plaintiff was very much lower than the figure shown on plaintiff's Exhibit 1. In any event, the testimony of the bankrupt and his other witnesses fully explained what happened to the assets of Delta Towing Company.

With respect to the other objections, Mr. Vickers was examined at length with respect to all of the various assets

shown on plaintiff's Exhibit 1 and I find that he has explained what happened to each of those assets and I find that there has been no failure to explain losses or deficiency of assets and that there has been no proof that the defendant transferred, removed or concealed assets with intent to hinder, delay and defraud his creditors. Likewise I find that the objections that he failed to list in his schedules assets shown on the financial statement have not been sustained.

One item on plaintiff's Exhibit 1 that deserves some comment is the home on Macon Lake Plantation, which, according to plaintiff's Exhibit 1, was said to have an appraised value of $900,000.00. Actually, prior to the making of the loan, the bank had an appraisal made by a real estate firm of its choosing. That appraisal showed a value for the home of $300,000.00 and the bank took a promissory note and mortgage on that home for $300,000.00, signed by both the bankrupt and by his wife, Susan Smith Vickers.

It would serve no useful purpose for the court to detail the evidence with regard to each of the items of property which the defendant admitted that he had owned. Suffice it to say that the court finds that he has fully explained what happened to each of such items.

The plaintiff having failed to meet the burden of proof as to any of its objections, it follows as a conclusion of law, that the complaint and amended complaint should be dismissed on the merits and that the bankrupt should be granted a discharge.

An appropriate judgment will be entered.

The trial of this adversary proceeding was held on May 10 and May 11, 1979. At its conclusion late in the afternoon of May 11th, the court reserved decision but announced that it would try to have its opinion filed within a short time. Thereafter, while the court was in the process of preparing its opinion, but before the opinion had been

handed down, the plaintiff, on May 21, 1979, filed two written motions, both addressed to the discretion of the court. These must now be disposed of.

One of these motions was to reopen the record so as to permit the plaintiff to call J. Herbert Boydston, a former officer of Bossier, to the stand to testify with regard to plaintiff's Exhibit 1, its genuineness and the falsity of figures contained therein. The motion is, substantially, a mere reflection of the motion that was made and overruled during the trial, except that it is supported by the affidavit of Mr. Boydston. I have already discussed, in this opinion, the reasons why I believe I was correct in overruling the earlier motion. There is nothing in Mr. Boydston's affidavit that bears on my finding that plaintiff's Exhibit 1 was not the financial statement that Mr. Vickers had delivered to Colonial and/or Bossier. For that reason and, more especially for the reasons set out on page 11, 12 and 13 of this opinion, plaintiff's motion to reopen the case for the purpose of presenting the testimony of Mr. Boydston will be overruled.

Plaintiff's second motion was for leave to amend the complaint so as to allege a fresh ground of objection to the discharge. This proposed amended complaint charges, in substance, that at the trial on May 10 and 11, the defendant made a false oath in testifying (1) that he had not made or delivered to Colonial or to Bossier the financial statement that was introduced into evidence at the trial as plaintiff's Exhibit 1; (2) that he neither made nor caused to be published said statement; (3) that he had never seen and knew nothing of said statement; (3) that he had never seen and knew nothing of said statement; (4) that he had never discussed said statement and the assets listed therein with Messrs. Sneed and Boydston nor anyone else. The further allegation is made that these false oaths were knowingly and fraudulently made.

Since this pleading does not really amend any of the allegations of the original complaint or of the amended complaint, but seeks to raise a fresh cause of action which allegedly arose subsequent to the matter set forth in plaintiff's previous pleadings, it would more properly be called a supplemental complaint, rather than an amended complaint. That, however, does not affect the question of whether the motion should be granted. The courts have been quite liberal in granting leave to amend, and appellate courts have frequently stated that the court's discretion in passing on a motion to amend must be liberally exercised in favor of granting leave to amend if the other party is not actually prejudiced.

There are several reasons, however, why I believe that the motion should not be granted in this substance. First, this is not a motion made during the trial to conform pleadings to the proof. It is, instead, a motion made after the conclusion of the trial to assert an additional ground for objection to the discharge.

Second, although technically the oaths complained of as false seem to be within the prohibition of the second paragraph of § 152 of Title 18 of the United States Code, it was held by Judge Learned Hand that false oaths perpetrated during the trial of specifications of objection to While the Kretsch case has been derided by Collier (1A discharge are not of themselves grounds for denying a discharge. *In re Kretsch* (D.C.S.D.N.Y.) 172 Fed. 523. Collier on Bankruptcy, par. 14.25 footnote 4, p. 1335; *idem*, par. 14.26, footnote 3, p. 1339), the only appellate court that appears to have considered the question, citing *In re Kretsch, supra*, had this to say:

> ". . . . If taken literally the terms used are broad enough to comprehend a false oath made by the bankrupt in the hearing upon the specification of objection to his discharge.

> "There is, however, grave doubt whether the bankrupt law contemplates that a bankrupt shall be denied his discharge solely on the ground that he has made such a false oath."

See Manson v. Inge, 13 F.2d 567, 569 (C.A. 4). Despite the Collier footnotes, I agree with Judge Hand that false oaths during the trial of the discharge hearing itself are not grounds for denial of discharge.

Third, this court has already found that the oaths complained of were not false, and that the financial statement put in evidence as plaintiff's Exhibit 1 was not the financial statement which the bankrupt delivered to Colonial or Bossier. To grant this motion now would allow the plaintiff to have a second trial of an issue that has already been tried and decided by the court. To permit the plaintiff to use an amended or supplemental complaint as a device for obtaining another trial of this issue would not, in my opinion be in the interest of justice. An order will be entered overruling the motion for leave to file an amended or supplemental complaint.

Dated: May 30, 1979.

/s/ E. J. Raphael
Eugene J. Raphael
Bankruptcy Judge

ANNEX

JAMES D. VICKERS
FINANCIAL STATEMENT
April 30, 1977

ASSETS

Current Assets:		
Cash in Bank—Checking	$ 56,400.00	
Cash in Bank—Savings	201,400.00	
Stock acquisition costs—		
Mainstream Shipyards	200,000.00	
Total Current Assets		$ 457,800.00
Other Assets:		
Book Value—		
Delta Towing Company	685,000.00	
Book Value—		
Toche Enterprises, Inc.	198,962.17	
Total Other Assets		883,962.17
Fixed Assets:		
(Estimated Fair Market Value)		
1977 Cadillac Seville	12,000.00	
1975 ½ Ton Pickup Truck	4,200.00	
1977 Chevrolet Luv Truck	5,200.00	
1974 V.W. Truck	2,600.00	
1 Camper Trailer	600.00	
Farm Equipment	60,000.00	
2 Wheel Tandem Trailer	1,000.00	
50 Cows	8,500.00	
1 Bull	700.00	
Home (Macon Lake Plantation)		
Appraised Value	900,000.00	
Personal Jewelry and		
Home Furnishings	300,000.00	
Pleasure Boat—1975	3,000.00	
Residential Real Estate		
(40 Acres)	32,000.00	
Total Fixed Assets		1,329,800.00
TOTAL ASSETS		$2,671,562.17

LIABILITIES

Current Liabilities:		
Note Payable—		
Citizens Bank, Pillar, Ark.	$ 31,000.00	
Note Payable—Real Estate ..	153,000.00	
Account Payable—G.M.A.C. ..	800.00	
TOTAL LIABILITIES		$ 184,800.00

EQUITY

James D. Vickers—Equity	2,486,762.17
TOTAL LIABILITIES AND EQUITY	$2,671,562.17

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

No. GBK78-00147

IN RE: JAMES DWIGHT VICKERS,
a/k/a J. D. VICKERS,
a/k/a JIM VICKERS,
a/k/a JIMMY VICKERS, BANKRUPT

COLONIAL BANK OF NEW ORLEANS, *Plaintiff*

VS.

JAMES DWIGHT VICKERS, *Defendant*

JUDGMENT

(Filed May 31, 1979)

The above captioned adversary proceeding having duly come on for trial, and having been tried, and decision having been reserved, and the court having thereafter filed an opinion setting forth, in narrative form, findings of fact and conclusion of law, it is

ORDERED AND ADJUDGED that the complaint herein be and it hereby is dismissed with prejudice.

Dated: May 31, 1979.

/s/ E. J. RAPHAEL
Eugene J. Raphael
Bankruptcy Judge

80-1850
NO.

Office-Supreme Court, U.S.
FILED
JUN 3 1981
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1980

IN RE: JAMES DWIGHT VICKERS
a/k/a J. D. VICKERS
a/k/a JIM VICKERS
a/k/a JIMMY VICKERS

COLONIAL BANK OF NEW ORLEANS, *Petitioner*

v.

JAMES DWIGHT VICKERS, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Did the Bankruptcy Court make clearly erroneous findings of fact in concluding that Respondent Bankrupt did not submit to Petitioner a materially false written financial statement to obtain money on credit?

2. Did the Bankruptcy Court make clearly erroneous findings of fact in concluding that Respondent Bankrupt explained satisfactorily losses of assets or deficiency of assets to meet his liabilities?

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NO. 80-1850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

IN RE: JAMES DWIGHT VICKERS
a/k/a J. D. VICKERS
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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

STATUTES AND RULES

Supreme Court Rule 17.1(a)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

STATEMENT OF THE CASE

On November 17, 1978, the Respondent, James Dwight Vickers (hereafter Vickers), filed his voluntary petition in bankruptcy in the Northern District of Mississippi. On February 15, 1979, the Petitioner, Colonial Bank of New Orleans (hereafter Colonial Bank), filed a complaint objecting to Vickers' discharge in bankruptcy. One ground of objection to discharge was that Vickers had obtained substantial sums on credit from Colonial

Bank by submitting a materially false written financial statement to it. Another ground raised was that Vickers could not satisfactorily explain his losses or deficiency of his assets to meet his liabilities. *See* 11 U.S.C. § 32(c)(3) & (7).

During a two-day trial ending May 11, 1979, the Bankruptcy Court received evidence on these issues. At that time, Colonial Bank attempted to introduce into evidence a written financial statement allegedly executed by Respondent on April 30, 1977. Colonial Bank's President, through whom the exhibit was offered, testified that this was the only statement of Respondent's financial condition he had ever seen. However, he could not say how or when Petitioner came into possession of the financial statement, and neither he nor any other witness saw Vickers sign the bottom of the document, where a signature purporting to be his appears.

Vickers himself denied that either the signature or the financial statement was his. He testified that the statement he did give the Petitioner consisted of several pages, rather than only one, and that it was accompanied by a series of explanatory notes and an accountant's statement explaining Vickers' interest in another company. Moreover, Vickers' father, his accountant, and one of the senior Vickers' bookkeepers testified that they were well acquainted with Respondent's signature and that the signature appearing on the bottom of the alleged financial statement was not his.

Vickers stated that on the personal financial statement he did give Petitioner, he listed as an asset his home in Chicot County, Arkansas. In his testimony, Vickers did not assign a value to the house. He did testify that at the time he executed his personal financial statement, he was in the process of becoming divorced, yet considered the house partially his because no divorce decree had been entered. The proof at trial showed that Vickers continued to spend considerable amounts of money on the house to improve it and to complete its construction. The proof also showed that Petitioner had an appraisal made of the home prior to disbursing any loan funds. The appraiser estimated the value of the house at $300,000.00. Petitioner checked the title to the house before accepting it as security for the loan and took the further step of protecting itself by having both Vickers and his wife execute the mortgage.

Vickers also listed on the financial statement that he did submit to Petitioner a $200,000.00 asset relating to a stock acquisition of Mainstream Shipyards. This asset was valueless if Vickers did not carry through with the purchase of Mainstream Shipyards. The proof showed that in a footnote to this financial statement, Vickers fully disclosed the nature of the asset and that it was contingent upon his purchase of the shipyard. This option remained open to Vickers at the time of trial.

At trial, Vickers explained in detail his losses or deficiencies of his assets to meet his liabilities between the time he

made his financial statement and the time he filed bankruptcy. The proof showed that Vickers invested a considerable amount of his money into improving the status of a business venture he had taken over. There was no proof that Vickers had transferred, removed or concealed assets with intent to hinder, delay or defraud his creditors, and there was no proof that he failed to keep adequate books and records.

On May 31, 1979, the Bankruptcy Judge dismissed Petitioner's complaint. On the basis of the evidence outlined above, he found as facts that (1) the financial statement proffered by Petitioner contained a forged signature and was therefore not the financial statement Vickers had submitted to it, (2) Vickers' authentic financial statement contained true and correct information, and (3) Vickers' explanations concerning losses or deficiencies of assets were cogent and convincing. These factual findings led to the Court's conclusions of law (1) that Vickers did not obtain money on credit through use of a materially false written financial statement, and (2) that Vickers explained satisfactorily losses of assets or deficiency of assets to meet his liabilities.

On February 13, 1980, the United States District Court for the Northern District of Mississippi summarily affirmed the Bankruptcy Judge's decision. By *per curiam* decision of November 24, 1980, the United States Court of Appeals for the

Fifth Circuit affirmed the District Court's decision, and on February 19, 1981, denied Colonial Bank's Petition for Rehearing.

SUMMARY OF ARGUMENT

Petitioner contends that this Court should review the decision of the United States Court of Appeals for the Fifth Circuit because that Court "has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." Supreme Court Rule 17.1 (a). The departures alleged are the Bankruptcy Court's erroneous findings of fact and the appellate courts' failure to set them aside. To prevail, Petitioner must show that the Bankruptcy Court's findings of fact were supported by no substantial evidence and were against the clear weight of the evidence. Review of the Statement of the Case above, and of the Bankruptcy Court's thorough Memorandum Order, illustrates that Petitioner cannot meet the burden the law places on it.

ARGUMENT

Petitioner seeks review before this Court based on Supreme Court Rule 17.1(a), which recites as one reason for granting review on writ of certiorari that a Federal Court of Appeals

"has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision." Petitioner contends that the United States Court of Appeals for the Fifth Circuit has widely departed from the normal course of judicial proceedings by failing to apply correctly the clearly erroneous rule of appellate review. As stated in the seminal case *United States vs. United States Gypsum Company*, 333 U.S. 364, 395 (1948), a finding of fact is clearly erroneous "when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." An appellate court must not overturn a lower court's findings of fact unless there is no substantial evidence to sustain them and they are against the clear weight of the evidence. 5A *Moore's Federal Practice*, Para. 52.03[1] (1980). This standard of review applies to findings of fact made in bankruptcy proceedings. *In Re: Bleaufontaine, Inc.*, 634 F.2d 1383, 1389 (5th Cir. 1981).

The clearly erroneous rule applies only to findings of fact and not to conclusions of law. Conclusions of law are subject to *de novo* review by appellate courts. Although Petitioner has couched its Questions Presented for Review in terms of the

clearly erroneous rule, in fact Petitioner would have this Court apply the clearly erroneous rule to the lower courts' conclusions of law rather than to the Bankruptcy Court's findings of fact.

With respect to the issue whether Vickers secured credit by use of a materially false written financial statement, the Bankruptcy Court found as facts that the financial statement proffered by Petitioner was not the financial statement given to it by Respondent and that the financial statement Respondent did give to Petitioner contained no false statements. Because the record contained no evidence that Respondent made a false statement in writing about his financial condition, the Bankruptcy Court concluded, as a matter of law, that Repondent should not be denied discharge in Bankruptcy on the allegation that he had submitted a materially false written financial statement in order to obtain credit. Viewing this legal conclusion as inescapable given the facts found by the Bankruptcy Court, the Fifth Circuit Court of Appeals determined that these factual findings were supported by the clear weight of the evidence and therefore affirmed the Bankruptcy Court's decision.

The Fifth Circuit Court of Appeals engaged in a similar process in considering Petitioner's contention that Respondent failed to explain satisfactorily losses of assets or deficiency of assets to meet his liabilities. The Bankruptcy Court found as a fact that Respondent came forth with cogent and convincing

explanations as to what had happened to his assets. In particular, the Bankruptcy Court noted that Petitioner itself determined Respondent's home was worth $300,000.00 and took it upon itself to research its title. Again, viewing the legal conclusion that Respondent satisfactorily explained losses of assets or deficiency of assets to meet his liabilities as mandated by the Bankruptcy Court's findings of fact, the Fifth Circuit Court of Appeals affirmed the Bankruptcy Court's ruling after determining that the Bankruptcy Court's findings of fact were supported by substantial evidence and were not against the clear weight of the evidence.

CONCLUSION

The facts recited in the Statement of the Case and in the Bankruptcy Court's Memorandum Order illustrate that the Bankruptcy Court's findings of fact were not clearly erroneous. The Bankruptcy Court and the United States Court of Appeals for the Fifth Circuit determined that the legal conclusion that Respondent should not be denied discharge in bankruptcy on these grounds inexorably followed these findings of fact. Petitioner having failed to show that the United States Court of Appeals for the Fifth Circuit has departed from the accepted and usual course of judicial proceedings, Respondent prays that this Court deny Colonial Bank's Petition for Writ of Certiorari

to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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